Palmer A. Hoovestal
HOOVESTAL LAW FIRM PLLC
P.O. Box 747
Helena, MT 59624-0747
Phone: (406) 457- 0970
Fax: (406) 457-0475
Email: palmer@hoovestal-law.com

William A. Coates
(Admitted *Pro Hac Vice*)
ROE CASSIDY COATES &
PRICE PA
P.O. Box 10529
Greenville, SC 29603
Phone: (864) 349-2600
Fax: (864) 349-0303
Email: wac@roecassidy.com

Elizabeth Van Doren Gray
(Admitted *Pro Hac Vice*)
SOWELL GRAY STEPP & LAFFITTE LLC
P.O. Box 11449
Columbia, SC 29211
Phone: (803) 929-1400
Fax: (803) 929-0300
Email: egray@sowell.com

Attorneys for William J. McCaig

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. W.R. GRACE, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. MCCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, ROBERT C. WALSH, Defendants.	)	Cause No. CR 05-07-M-DWM **DEFENDANT WILLIAM J. MCCAIG'S MOTION FOR JUDGMENT OF ACQUITTAL AND MEMORANDUM IN SUPPORT** **Oral Argument Requested**

Pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure, William J. McCaig hereby moves for the entry of a judgment of acquittal at the close of the government's case because the evidence is insufficient to sustain a conviction against him.

Pursuant to CR 12.2, counsel for the Government, Kris McLean, has been contacted regarding this motion and Mr. McLean indicated that the Government "has no position at this time" on the motion.

INTRODUCTION

Twenty-one years after leaving his post as operations manager of the facility in Libby, Montana, William J. "Bill" McCaig stands charged with conspiring to knowingly endanger the Libby community and to defraud the federal government with respect to the relevant health risks of vermiculite. This charge has never made sense. Bill McCaig lived and worked in Libby. The idea that there was a conspiracy to intentionally endanger the people of Libby and to defraud the federal government, and that Bill McCaig joined it while living in Libby with his wife and two young boys, is inconceivable.

Indeed, after spending weeks presenting its case, the government has presented no evidence demonstrating that such a conspiracy existed, much less that Bill McCaig joined it. Because no rational juror can find the essential elements of a conspiracy

beyond a reasonable doubt, the Court should enter a judgment of acquittal in favor of William J. McCaig.

THE CHARGE

Count I of the Superseding Indictment alleges that beginning on or about 1976, and continuing until on or about 2002, Bill McCaig and the other named defendants conspired: (a) to knowingly release and cause to be released into the ambient air a hazardous air pollutant, namely asbestos, and at the time knowingly placed persons, including families of Grace employees, residents of Libby, Montana, and surrounding communities in Lincoln County and others in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 7413(c)(5)(A)[1]; and (b) to defraud the United States and others responsible for administering federal laws and regulations designed to protect public health and safety and the environment, including EPA and NIOSH, in violation of 18 U.S.C. § 371. Superseding Indictment ¶ 71; Instruction No. 3-W.

This is the only charge against Bill McCaig.

THE ELEMENTS OF THE OFFENSE

"For a defendant to be found guilty of the conspiracy charged, the government must prove each of the following elements beyond a reasonable doubt as to that particular defendant:

[1] Section 7413(c)(5)(A) is part of the Clean Air Act and became law on November 15, 1990. PL 101-549.

First, there was an agreement between two or more persons to defraud the United States and/or to knowingly release or cause to be released into the ambient air a hazardous air pollutant, knowing at the time that the release places another person in imminent danger of death or serious bodily injury; and

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish that object or objects; and

Third, one of the members of the conspiracy performed at least one overt act after November 3, 1999, for the purpose of carrying out one or both objects of the conspiracy, with all of you agreeing on a particular overt act that you find was committed and on the particular object or objects that the overt act was intended to accomplish." Instruction No. 4-W.

THE EVIDENCE

Testimony

After eight weeks of testimony from 46 witnesses and over 6000 pages of transcript, the name Bill McCaig has been mentioned only a handful of times, and the substance of that testimony is completely innocuous, consistent with innocence, and totally contrary to guilt.[2] Indeed, the testimony relates primarily to Bill's work and

[2] Even the so-called unindicted coconspirator, Bob Locke, had nothing to say about Bill McCaig. Locke testified: "I don't think I worked with Mr. McCaig until 1990, at which time he was in charge of the Enoree mining, milling operations down in South Carolina and he reported to a man who ran that business who reported to me." Trial Tr. p. 3586, lines 11 – 15.

tenure at the Libby facility. The following is a concise summary of the entire testimony concerning Bill McCaig:

1. Bill began working at the Libby facility in early 1970s, became the operations manager in 1979, and left in 1988. Trial Tr. p. 5010, line 21 – p. 5011, line 4; p. 5032, lines 1 – 6.

2. Former Plummer Elementary teacher Brad Kelsch taught Bill's sons in the early 1980's. Trial Tr. p. 5130, lines 20 – 22.

3. Bill's former secretaries, Carolyn Horka and Rayetta Morrison, testified that they worked for him and typed letters and other documents for him. Trial Tr. p. 4933, lines 16 – 24; p. 4941, line 5 – p. 4942, line 15.

4. Rayetta Morrison testified that in July, 1985, she typed letters from Bill to area doctors inviting them to attend the McDonald/McGill University health surveillance presentation in Libby. Trial Tr. p. 4958, line 5 – p. 4961, line 24. She identified a letter to Dr. Whitehouse (one of the government's expert witnesses), in which Bill encouraged him to tour the mine and to hear the presentation. Trial Tr. p. 4965, lines 8 – 18.

5. Former Grace chemist Dr. Julie Yang testified that Bill was in Cambridge "sometime for other discussions" about the mining business, and when he was there on August 20, 1982, she discussed fiber counting with him. Trial Tr. p. 3543, lines

4 – 20.

6. Former Grace employee Randy Geiger, an environmental engineer at the facility from 1976 to 1990, testified that some time in 1981, Bill asked him to test the high school track for fiber exposures, which he did.[3] Trial Tr. p. 5271, lines 9-16.

7. None of the former Grace employees who worked in Libby and who testified, including Bob Beagle, Randy Geiger, Carolyn Horka, Rayetta Morrison, Leroy Thom, and Bruce Zwang, implicated Bill in any criminal activity whatsoever.

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[3] Geiger's testimony concerning the testing of the high school track was immediately followed with a limiting instruction from the Court:

> This evidence is not to be considered by you in terms of whether or not there was a release or a release resulting in endangerment because, remember, the law wasn't enacted until 1990. This evidence only goes to the question of whether or not there may have been some misrepresentation as it relates to the CERCLA 104(e) responses to the EPA. That was the civil part of things. And the argument is, apparently, that it could be considered for whether or not there was an obstruction. This is not evidence of a release that endangered anybody and cannot be considered for that purpose.

Trial Tr. p. 5275, line 16 – p. 5276, line 1. Importantly, Bill McCaig is *not* charged in connection with the 104(e) response to the EPA in 2000. Superseding Indictment ¶ 194.

Trial Exhibits

Only 14 of the 612 exhibits that have been admitted during this trial have Bill McCaig's name on them. Eight exhibits were introduced by the government, and six exhibits were introduced by the defense.

The government introduced Exhibits 228A, 239A, 266, 267, 268, 271, 310, and 344. Exhibit 228A is the only document authored by Bill McCaig, and the Court found that it is not relevant to the conspiracy charge. See Order dated April 23, 2009 (Doc. No. 1104) (stating that Exhibit 228A "may have some relevance as to Count VI and is admitted on that basis"). Three other exhibits—239A, 267, and 271—were admitted with limiting instructions stating that they, too, were not relevant to the conspiracy charge. First, the Court instructed the jury that Exhibit 239A

> is not relevant to prove anything about an agreement between two or more persons. It is not relevant to anything about knowingly releasing or endangering people. It is not relevant as it relates to Counts II, III, and IV as to any release into the ambient air, placing another person in imminent danger of death or serious bodily injury. It may be considered by you for other allegations, including those allegations in Counts V, VI, VII, and VIII in terms of your understanding of what the evidence shows concerning whether or not information was false or misleading.

Trial Tr. p. 998, lines 15-21.

Second, the Court instructed the jury that Exhibit 267

> is not proof of any ambient air release. You have to look at the date of the exhibit. If it has relevance to issues concerning Counts II, III, IV, V, VI, VII and VIII, you can consider it as it may relate, if you find it, to the

> character of what was there or to any knowledge that any party may have had about it or the – whether or not the information may or may not be misleading or false. It is not proof of an ambient air release that falls within the statute of limitations, which is November 3rd of 1999. And it cannot be considered by you for that purpose.

Trial Tr. p. 873, line 24 – p. 874, line 8.

Third, with respect to Exhibit 271, the Court stated:

> Again, ladies and gentlemen, this document, you need to carefully look at the date and put it in the context of the allegations that are in the case. It may be relevant to some issues. The earlier instruction that I've given to you applies to this as to its limited purpose.

Trial Tr. p. 963, line 22 – p. 964, line 1.

The remaining exhibits likewise lack probative value regarding the alleged conspiracy. Exhibit 310 was admitted "for the limited purpose of showing, I guess, the propensities of vermiculite." Trial Tr. p. 1892, lines 7 – 11. Exhibits 266 and 268 relate to the proposed NIOSH epidemiological study in Libby. Bill was merely copied on both documents, along with several other people. Finally, Exhibit 344 is a memo related to fiber counting. There is a handwritten note on the memo indicating that a copy should be sent to Bill. This is it. This is the documentary evidence that has been admitted regarding Bill McCaig.

The defense introduced Exhibits 5444, 6881, 8983, 14010, 17015, and 17016. Exhibits 6881, 17015, and 17016 were introduced through Rayetta Morrison to establish that Bill invited area doctors—including Dr. Whitehouse—to hear the results

of the McGill University Study regarding the health of Libby workers. Bill wrote a note on the letter to Dr. Whitehouse (Exhibit 6881), saying "I hope you can possibly reconsider," which supports an inference that Bill was trying to persuade Dr. Whitehouse to attend the informational meeting. The remaining exhibits (5444, 14010, and 8983) were offered by co-defendants, and no testimony related to Bill McCaig was given in connection with them.

This is the state of the evidence at the close of the government's case. The evidence is telling both for what it shows and what it does not show. First, there is no evidence at all of an agreement between two or more people to do an illegal act. Second, assuming such an agreement did exist, there is no evidence that Bill McCaig joined any such conspiracy knowing of at least one of its objects and intending to help accomplish the object or objects. There is no evidence that Bill intended to accomplish the knowing-endangerment object because the relevant law did not even exist until November 15, 1990, which is two years after Bill left Libby. The evidence related to Bill McCaig does not even go past 1988, when Bill left Libby and his position at the Libby facility. There is no evidence that Bill McCaig had a legal duty to disclose information to the federal government or that he intended to frustrate a lawful governmental function or that he knew anyone who did. Finally, there is no evidence that Bill McCaig did *anything* after 1988 that could prove he joined or

reaffirmed an agreement to knowingly endanger residents of Libby after November 15, 1990, much less anything that could be interpreted as an overt act after November 3, 1999.[4]

This case is not even a close call. The government has failed to meet its burden of proof. Bill McCaig should be acquitted.

LEGAL STANDARD

"After the government closes its evidence . . . , the court on the defendant's motion must enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Evidence is insufficient to sustain a conviction if, when viewed in the light most favorable to the government, no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. United States v. Johnson, 357 F.3d 980, 983 (9th Cir. 2004).

ARGUMENT

There is no evidence in this record to sustain a conviction for conspiracy against Bill McCaig beyond a reasonable doubt. There is no evidence that a conspiracy existed at all, much less that Bill knew about it, joined it, or intended to help accomplish either of its objectives. A judgment of acquittal should be entered in favor of Bill McCaig.

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[4] Bill stopped working for Grace in 1995, four years before the applicable statute of limitations, a fact known by the government but undisclosed in this case.

I. The government's proof does not satisfy the elements of a conspiracy.

At the outset, the government must prove that "there was an agreement between two or more persons to defraud the United States and/or to knowingly release or cause to be released into the ambient air a hazardous air pollutant, knowing at the time that the release places another personal in imminent danger of death or serious bodily injury." Instruction No. 4-W.

"The crime of conspiracy is the agreement to do something unlawful." Instruction No. 4-W. "For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy." Id. "It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another." Id.; accord United States v. Melvin, 91 F.3d 1218, 1224 (9th Cir. 1996) (approving a similar jury instruction). There must be evidence beyond a reasonable doubt that there was a plan to commit at least one of the criminal objects alleged in Count I. See Instruction No. 4-W.

A. There is no evidence of an agreement.

No rational juror could conclude beyond a reasonable doubt that the defendants in this case reached an agreement to commit an illegal act. The government has failed to present any evidence that two or more people agreed to either defraud the United

States government or its agencies or to knowingly endanger residents of Libby, Montana. The defendants intend to file a joint motion for acquittal on Count I of the Superseding Indictment on a number of grounds. Those arguments are fully adopted and incorporated here. For the reasons set forth in the joint motion, the Court should enter a judgment of acquittal on Count I in the Superseding Indictment in favor of Bill McCaig.

B. Even if a conspiracy existed, Bill McCaig did not join it.

"One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all of the details of the conspiracy." Instruction No. 4-W. "[O]ne who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator." Id. "Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists." Instruction No. 4-W; accord United States v. Melchor-Lopez, 627 F.2d 886, 891 (9th Cir. 1980) (providing that mere association with members of a conspiracy is not enough); United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974) ("Mere knowledge of the existence of a conspiracy is not sufficient to sustain a conviction.").

Here, the government has offered no proof of a conspiracy. Even if it had, no rational juror could find beyond a reasonable doubt that Bill McCaig joined it. There has been no evidence that Bill McCaig knew about any alleged conspiracy or participated in it. The evidence has shown only that Bill McCaig began working at the Libby facility in the early 1970s, became the operations manager in 1979, and stopped worked at the facility in 1988. He received documents advising that the NIOSH study was going forward in Libby and that the study would last 2 to 3 years. He directed Randy Geiger to test the high school track in 1981. He discussed fiber counting with Dr. Julie Yang in 1982. The mere fact that he was employed by Grace and worked at the Libby facility and communicated occasionally with others concerning the business does not mean that he joined a conspiracy. Any contact that Bill McCaig had with the other defendants occurred in a lawful business environment and is consistent with innocence and not guilt. The government has proved only the obvious: the defendants worked for the same company and communicated with one another.[5] There has been absolutely no evidence in this case that there was a

[5] Working for the same company does not a co-conspirator make. Indeed, if the law is willing to recognize that members of a gang—who are prone to violence and illegal activity—cannot be automatically deemed co-conspirators based on their association with one another, the law certainly does not presume that people who work together in a legitimate and large business corporation are co-conspirators. See United States v. Garcia, 151 F.3d 1243, 1246 (9th Cir. 1998) (holding that membership in a gang that engages in violent confrontations does not demonstrate a coordinated effort with a specific illegal objective in mind sufficient to sustain a conspiracy conviction).

coordinated effort with a specific illegal objective in mind. Contrary to the government's position, receiving documents that have been written by others in a corporation and that communicate ordinary business activities does not prove that the recipient is a coconspirator. Mere association is not enough.

During this trial and outside the presence of the jury, the government has suggested that the business communications written or received by some of the defendants, along with other employees of Grace, constitute evidence of a conspiracy. The government seriously misunderstands how corporations function. Memoranda are written. Copies are sent to colleagues who have some interest in the communication. Just because someone sends or receives memoranda does not mean he is a co-conspirator. The government must establish more than that Bill McCaig wrote or received documents during the course of his employment in Libby. The government has to prove that Bill McCaig knew of the existence of the conspiracy and had the intent to further its illegal goals. See United States v. Esparza, 876 F.2d 1390, 1392 (9th Cir. 1989) ("Proof of the defendant's connection to the conspiracy requires a showing that the defendant knew of the existence of the conspiracy and acted with the intent to further its goals."). The government has shown neither.

Because no rational juror could find beyond a reasonable doubt that Bill McCaig knew about the alleged conspiracy and acted with the intent to further either

of its objectives, the motion for judgment of acquittal should be granted.

II. The government has failed to prove that Bill McCaig conspired to endanger the Libby community.

To sustain a conviction for the conspiracy to endanger, the government must show that an agreement existed after November 15, 1990. Instruction No. 7-W. Proof before that time can be considered *provided that* the government also shows that "the agreement continued in existence and was adhered to, recognized, and re-affirmed by the coconspirators after November 15, 1990." Id.

No rational juror could find beyond a reasonable doubt that Bill McCaig was a part of a conspiracy to endanger after November 15, 1990. The government has presented no evidence about Bill McCaig after 1988, much less any evidence that he "reaffirmed" the existence of the conspiracy to endanger in 1990. On this basis alone, the judgment of acquittal must be entered.

"Establishing a defendant's guilt of conspiracy to commit a substantive crime requires proof of the *mens rea* essential for conviction of the substantive offense itself." United States v. Baker, 63 F.3d 1478, 1493 (9th Cir. 1995). To prove knowing endangerment under the Clean Air Act, the government must show that the defendant "knowingly release[d] into the ambient air any hazardous air pollutant . . . and [knew] at the time that he thereby place[d] another person in imminent danger of death or serious bodily injury . . . ." 42 U.S.C. § 7413(c)(5)(A). "In determining

whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury – (i) the defendant is responsible only for actual awareness or actual belief possessed . . . ." 42 U.S.C. § 7413(c)(5)(B)(i).

The government has not—and indeed cannot—show that Bill McCaig intended to violate the Clean Air Act. The relevant provision of the Act was not passed until November 15, 1990, two years after Bill left his post as the operations manager in Libby. The evidence concerning Bill primarily relates to events that occurred in the early and mid-1980s. He could not have had the requisite intent in the 1980s to commit a crime that did not exist until late 1990. No rational juror can conclude beyond a reasonable doubt that Bill had the requisite intent to commit the underlying offense. Nor can he be punished for actions that were not criminal at the time. See Aponte v. Gomez, 993 F.2d 705, 708 (9th Cir. 1993) ("The Ex Post Facto Clause forbids both the punishment for acts not punishable at the time the offense was committed and the imposition of an additional punishment beyond that permitted at the time of the offense.").

III. The government has failed to prove that Bill McCaig conspired to defraud the United States government.

"An agreement is entered into with the object of defrauding the United States if the purpose of the agreement is to impair, impede, or frustrate a lawful

governmental function of the United States by deceitful and dishonest means." Instruction No. 5-W; accord United States v. Caldwell, 989 F.2d 1056, 1058-59 (9th Cir. 1993) (setting forth the elements of a conspiracy to defraud). "It is not enough that there was an agreement with the goal of making the government's job more difficult." Instruction No. 5-W; accord Caldwell, 989 F.2d at 1060. "A person does not impair, impede or frustrate the United States by failing to volunteer information to the government if there is no legal duty to disclose the information." Instruction No. 5-W; accord United States v. Murphy, 809 F.2d 1427, 1431-32 (9th Cir. 1987) (providing that when a defendant does not have a legal duty to disclose information, the failure to disclose or volunteer information does not mean that the defendant conspired to defraud the government).

In addition to failing to establish a conspiracy to defraud the United States even existed, the government has failed to set forth any evidence that Bill McCaig knew about or participated in any such conspiracy. There is no evidence whatsoever that Bill McCaig intended to defraud the government or acted in a way that obstructed the operation of any government agency by deceitful or dishonest means. There is no evidence that Bill McCaig had a duty to report certain information to a government agency or that he withheld information or knew that anyone else did. There is no evidence that a government agency requested information from Bill and that he failed

to respond. There is no evidence that Bill had any connection to, or responsibility for, communications with federal agencies, other than his limited role in opening the doors of the Libby facility to the EPA, NIOSH, and MSHA.

Because of the lack of evidence linking Bill McCaig to the alleged conspiracy to defraud the government, no rational juror could find that the essential elements of a conspiracy to defraud the government have been established beyond a reasonable doubt.[6]

CONCLUSION

The tragedy in this case is that Bill McCaig—the only defendant who lived and worked in Libby, Montana, for 17 years (between 1971 and 1988); who worked side-by-side and stood shoulder-to-shoulder with the employees at the Libby facility; who breathed the same air that they did; who raised a family in Libby; and whose children attended the schools in Libby—was ever charged with the crime of conspiracy to

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[6] Even if there were a conspiracy and even if Bill McCaig knew about it and participated in it—all of which is denied and has not been shown in this case—the uncontroverted evidence is that Bill would have withdrawn from the conspiracy in 1988 when he stopped working at the Libby facility (and certainly by 1995, when his employment at Grace ended). "One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the co-conspirators about those acts." Instruction No. 10-W. The fact that Bill left Libby and his position as operations manager is entirely inconsistent with any alleged purpose of the conspiracy. His departure from Libby in 1988 (and Grace in 1995) communicated his withdrawal to the alleged co-conspirators. See United States v. Kilby, 443 F.3d 1135, 1139 (9th Cir. 2006); United States v. Lothian, 976 F.2d 1257, 1263-64 (9th Cir. 1992).

place the residents of Libby in imminent danger and to defraud the United States government. Bill has been defending these charges since February, 2005. After eight weeks of trial, his innocence has been confirmed. Justice requires that this Court enter a judgment of acquittal in favor of William J. McCaig without delay.

Respectfully submitted,

Palmer A. Hoovestal
HOOVESTAL LAW FIRM, PLLC
40 W. 14th Street, Suite 4A
P.O. Box 747
Helena, Montana 59624-0747
Phone: 406.457.0970
Fax: 406.457.0475
Email: palmer@hoovestal-law.com

William A. Coates
(Admitted *Pro Hac Vice*)
ROE CASSIDY COATES & PRICE, PA
1000 East North Street
P.O. Box 10529
Greenville, South Carolina 29603
Phone: 864.349.2600
Fax: 864.349.0303
Email: wac@roecassidy.com

Elizabeth Van Doren Gray
(Admitted *Pro Hac Vice*)
SOWELL GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
P.O. Box 11449
Columbia, South Carolina 29211
Phone: 803.929.1400
Fax: 803.929.0300
Email: egray@sowell.com

By: /s/ Palmer A. Hoovestal

Attorneys for William J. McCaig

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